Supreme Court, U. S.
FILED
JAN 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-800

DANA I. KESTENBAUM,

Petitioner,

v.

FALSTAFF BREWING CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This private treble damage antitrust action was brought by Dana I. Kestenbaum ("Kestenbaum") under Section 4 of the Clayton Act, 15 U.S.C. § 15, against Falstaff Brewing Corporation ("Falstaff") alleging numerous violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Petition for Writ of Certiorari omits certain pertinent aspects of the proceedings in the lower courts. Accordingly, Falstaff offers the following additional statement of the case.

Kestenbaum, a former distributor of Falstaff beer in four Texas counties, sold his distributorship operations in three separate transactions in late 1970 and early 1971. Approximately one and one-half years later he filed this action, which was initially tried and submitted to the jury on four separate theories allegedly constituting violations of Section 1 of the Sherman Act, 15 U.S.C. § 1: (1) price fixing; (2) territory and customer restrictions on resale of goods; (3) general combination and conspiracy in restraint of trade; and (4) restrictions on the sale of a going business concern. Judgment for Kestenbaum based on a general jury verdict was reversed and remanded by the United States Court of Appeals for the Fifth Circuit (the "Court of Appeals").[1] This Court subsequently denied Kestenbaum's Petition for Writ of Certiorari.[2]

Upon retrial, Kestenbaum modified and revamped several of his alleged antitrust claims. The testimony advanced by Kestenbaum at the second trial of the case did not differ substantially from the prior trial, with the exception of the expert testimony offered by Dr. Stanley Block. As ultimately submitted to the jury, Kestenbaum's various theories of recovery and conduct on which such theories were based were as follows:

[1] The first opinion of the Court of Appeals is reported as *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975). The Court of Appeals ruled that there was insufficient evidence to submit Kestenbaum's price fixing and territorial restriction claims to the jury and that the restraint on sale of a going business concern was improperly submitted as a per se violation. The Court determined that a remand for new trial was necessary because the trial court's general charge made it impossible to determine on which one or more of the four liability theories the jury had found in favor of Kestenbaum. 514 F.2d at 693-94.

[2] *Kestenbaum* v. *Falstaff Brewing Corp.*, 424 U.S. 943 (1976).

1. Price fixing from Falstaff's alleged prevention of Kestenbaum's desire to raise his prices 5¢ per case to cover contributions to charitable and trade associations.[3]
2. A general combination and conspiracy in restraint of trade consisting of:
   (a) Falstaff's alleged requirement that Kestenbaum engage in local advertising;
   (b) Falstaff's alleged requirement that Kestenbaum engage in bar spending; and
   (c) Falstaff's alleged requirement that Kestenbaum maintain three warehouses instead of permitting him to consolidate his operations in a single warehouse.
3. Restrictions allegedly imposed by Falstaff on the price at which Kestenbaum could sell his distributorship operations and persons to whom the distributorship could be sold.

The Court's charge to the jury included instructions on the above theories, the first being charged as a per se violation and the remainder under a rule of reason charge. The jury returned its verdict by use of a verdict form containing special interrogatories inquiring separately into Kestenbaum's contentions of (1) price fixing, (2) unnecessary warehouse costs, (3) unnecessary bar spending expense,

[3] This price fixing theory was not presented in the first trial. Initially Kestenbaum's price fixing claims were based on (1) Falstaff's price increases to Kestenbaum whenever Kestenbaum raised his wholesale prices and (2) his participation in price promotions or periodic short term wholesale price reductions that were shared equally between Falstaff and Kestenbaum. In view of the initial opinion of the Court of Appeals, Kestenbaum abandoned both of these price fixing theories, and advanced his new theory for the first time at the second trial of the case.

(4) unnecessary advertising costs, and (5) restrictions on the sale of his distributorship. The jury answered all interrogatories favorable to Kestenbaum and found damage under all of the foregoing theories. Judgment was entered on the basis of the jury's verdict in favor of Kestenbaum for $178,305.00, treble the amount of the jury's verdict as required by Section 4 of the Clayton Act, 15 U.S.C. § 15.

The thrust of Falstaff's appeal to the Court of Appeals was that Kestenbaum had not adduced sufficient proof at trial to justify the trial court's submission to the jury of his various theories of liability. In particular, Falstaff argued that there was a total absence of any showing of a substantially adverse affect on competition in the marketplace from the conduct that Kestenbaum claimed had caused him injury. Thus, there was error in submitting instructions to the jury under Kestenbaum's various rule of reason theories. Further, Falstaff contended there was inadequate proof of injury and damages to support the submission of Kestenbaum's revamped price fixing theory.[4] The Court of Appeals agreed, and held in summary that (1) Kestenbaum's proof of damages from price fixing was inadequate, (2) there was no showing that Falstaff's local advertising, bar spending, and warehouse requirements, and the use of the power to approve a purchaser of the franchise, had any anticompetitive effect, and (3) Kestenbaum's proof of lost goodwill was contrary to the law of the case.[5]

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[4] Falstaff's appeal also raised points on numerous errors committed in the trial court, each of which was treated and decided adversely to Falstaff by the Court of Appeals. A treatment of these points, however, is not essential to this Court's disposition of the Petition for Writ of Certiorari.

[5] The Court of Appeals' opinion is reported as *Kestenbaum* v. *Falstaff Brewing Corp.*, 575 F.2d 564 (5th Cir. 1978).

Kestenbaum now petitions this Court for a writ of certiorari and thereby assails virtually all aspects of the opinions of the Court of Appeals adverse to him.

ARGUMENT

Petitioner Raises No Issue Justifying the Issuance of the Writ

Kestenbaum's Petition for Writ of Certiorari attacks the opinion of the Court of Appeals on a broad front. The four questions Kestenbaum seeks to raise before this Court rely on strained interpretations of the evidence presented at the trial of the case and avoid the unequivocal rulings of the Court of Appeals. Using the same tactic as he employed before the Court of Appeals, Kestenbaum attempts to uphold the judgment of the trial court by arguing theories of substantive law different from those embodied in the trial court's instructions to the jury. The Court of Appeals rejected this jury-argument approach and properly held that there was insufficient proof in the trial record to uphold a recovery for alleged price fixing. The Court of Appeals likewise held that the trial court erred in submitting Kestenbaum's rule of reason theories of recovery to the jury in the absence of any showing that the challenged conduct caused some anticompetitive effect on the marketplace. The Court of Appeals also ruled that Kestenbaum had not offered proper proof of the goodwill value of his business as established by the law of the case.

In challenging the opinion of the Court of Appeals on each of the foregoing rulings, Kestenbaum's petition does not advance any reason why this Court's writ should issue in accordance with the criteria of Rule 19 of the Supreme Court. Although the Petition for Writ of Certiorari stands as an open invitation for Falstaff to demonstrate the insuf-

ficiency of Kestenbaum's proof by detailed reference to the evidence presented at trial and the trial court's instruction to the jury, these matters have been raised, argued, and passed upon by the Court of Appeals. No useful purpose is served by rearguing the evidentiary basis of this case, although the Petition for Writ of Certiorari obviously adopts this approach. It takes little more than a reading of the opinion of the Court of Appeals to demonstrate that the purely legal issues decided below are not of a nature and magnitude sufficient to warrant review by this Court under the criteria of Rule 19. Only brief discussion is required to confirm this proposition.

The Court of Appeals' Opinion is Properly Based on the Insufficiency of Petitioner's Proof

As the first point in its opinion, the Court of Appeals ruled that Kestenbaum's proof was insufficient to support a jury's award of damages under his price fixing theory. This ruling was, in effect, founded on the indisputable premise that an antitrust plaintiff who alleges damages from a purported price fixing scheme, must demonstrate his loss of net profit as opposed to loss of gross profit. See *Deaktor* v. *Fox Grocery Co.*, 475 F.2d 1112 (3d Cir.), *cert. denied*, 414 U.S. 867 (1973); *Umphries* v. *Shell Oil Co.*, 1973-1 Trade Cases ¶ 74,709 (S.D. Tex. 1973), *aff'd*, 512 F.2d 420 (5th Cir.), *cert. denied*, 423 U.S. 929 (1975); *Peter* v. *Union Oil Co. of California*, 328 F. Supp. 998, 1003 (C.D. Cal. 1971). This doctrine was stated in the prior appeal of this case that plaintiff must demonstrate his net economic loss from the alleged violation. *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F.2d 690, 696 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Kestenbaum simply failed to discharge his burden of proof in this regard.

The basic thrust of Kestenbaum's price fixing theory is that Falstaff prevented him from raising his wholesale price 5¢ per case. Kestenbaum supposedly desired to increase his price for the purpose of making contributions to charity and the local wholesale beer distributors association in Milam County, Texas. Damages claimed from this alleged prevention were calculated by a multiplication of 5¢ times Kestenbaum's historical sales from April 16, 1968 (four years prior to the date of filing suit) through 1970 (R. 143-144). Kestenbaum's testimony makes abundantly clear that his calculation of lost profits for the period indicated was based on guesswork and speculation. He acknowledged that he could not predict the affects on his sales of raising his price 5¢ per case, and further acknowledged that he did not know that the volumes used in making the calculations would have reflected the sales volumes at higher prices (R. 171, 224-225). In effect, Kestenbaum's damage calculations assume the best of both worlds — sales volumes obtained at a lower price plus the incremental profit of a higher price at which he was allegedly prevented from selling.

The Court of Appeals further ruled that in an effort to show his losses from the alleged price fixing, Kestenbaum relied upon a theory which was legally deficient. In essence, Kestenbaum's theory was that Falstaff prevented him from raising his prices a nickel a case in conjunction with other local wholesale distributors of beer — an act the Court of Appeals accurately termed a "local monopoly." The Court of Appeals appropriately noted that under the trial court's instruction, his higher price would not have been one obtained in a "freely competitive market" and observed that Kestenbaum's recovery on such a theory would constitute a manifest miscarriage of justice. 575 F.2d at 570. The Court of Appeals properly rejected the sufficiency of

proof under Kestenbaum's strained and revamped price fixing theory.

The bulk of Kestenbaum's petition is directed to the portion of the Court of Appeals' opinion holding that there was insufficient proof of an anticompetitive affect in the marketplace to justify the submission to the jury of various rule of reason theories pursuant to which Kestenbaum sought to recover additional expenses incurred by local advertising, bar spending and warehouse maintenance, and lost goodwill on the alleged restraint on the sale of his business. (Petition for Writ of Certiorari at 15-28.) Kestenbaum's entire argument is based upon a fundamental misconstruction of the theories on which the trial court's charge was given to the jury and the findings of the jury in response to special interrogatories embodied in the verdict form. In his Petition for Writ of Certiorari, Kestenbaum argues repetitively that his general rule of reason theories are based on the overall arrangement with Falstaff (including Falstaff's franchise agreement) which, he contends, contained elements of price fixing, territorial and customer restrictions, contractual provisions permitting short-term cancellation and Falstaff's approval of purchasers of the distributorship, and the coercive use of this arrangement to impose unwarranted and unnecessary expenses such as advertising, bar spending and warehouse locations. (Petition for Writ of Certiorari at 19, 23, 24, 25, 26, and 28.) Kestenbaum improperly argues that this general and pervasive theory was embodied in the court's instructions to the jury, and then proceeds to designate the price fixing and territorial allocation aspects of the overall arrangement as satisfying the necessary injury to competition. The entire argument is misconceived in its premise.

A review of the trial court's instructions to the jury reveals the liberties taken by Kestenbaum in characterizing

his rule of reason theories. It is plain from the introductory portion of the court's instructions on the substantive violations with which Falstaff was charged that Kestenbaum was asserting separate and distinct theories involving (1) price fixing, (2) general combination and conspiracy in restraint of trade, and (3) restraints on the sale of a going business concern (R. 607). Following the court's instruction to the jury on Kestenbaum's price fixing theory, the court instructed the jury on the rule of reason analysis by which the second and third theories of recovery were to be judged, and specifically excluded consideration of any alleged price fixing. In this connection the court instructed the jury as follows:

> In determining whether Plaintiff may recover damages for his claims that Defendant was part of a general combination or conspiracy which imposed unreasonable restraints of trade or commerce and that Defendant was part of a combination or conspiracy which prevented the Plaintiff from freely selecting a buyer and negotiating a price for the sale of his distributorship, *and disregarding the Plaintiff's price fixing claim*, you shall be governed by what is known in law as the "rule of reason." (Emphasis added.)

(R. 615.) The trial court then proceeded to instruct the jury on Kestenbaum's second theory of recovery involving general combination and conspiracy in restraint of trade, again specifically excluding consideration of price fixing (R. 616-17). A similar instruction was given in connection with Kestenbaum's restraint on the sale of his business specifically directing the jury to disregard the alleged price fixing violation (R. 618-19). Moreover, the trial court's charge did not include a territorial restriction claim, and in fact, instructed the jury not to consider any evidence of territorial restriction in awarding damages:

> You have heard evidence that Plaintiff was restricted to making sales within the territory to which he was assigned by Defendant, and was prevented from making sales outside such territory. *Plaintiff does not claim any damage by reason of these territorial requirements imposed by Defendant, and you shall not consider such requirements in assessing damages, if any. You shall not award damages, if any, to Plaintiff because Defendant's alleged requirement that Plaintiff sell only within a restricted territory.* (Emphasis added.)

(R. 625.) It is abundantly clear that the "rule of reason" theories advanced by Kestenbaum were simply not embodied in the court's instructions to the jury.

It is also significant that the jury's answers to special interrogatories do not support the theory on which the Petition for Writ of Certiorari attempts to sustain recovery under the rule of reason theories. The jury was submitted separate interrogatories inquiring as to whether Falstaff's conduct in connection with (i) warehouse costs, (ii) bar spending, (iii) distributor advertising costs, and (iv) the dictation of the sales price of Kestenbaum's distributorship, individually constituted an unreasonable restraint on interstate trade or commerce. Separate interrogatories followed inquiring as to causation, fact of injury, and damages as to each category of challenged conduct. There was, however, no jury finding of an overall arrangement involving elements of price fixing or territorial and customer restrictions.

Absent the distorted theory on which Kestenbaum attempts to sustain the judgment of the trial court under his rule of reason theories, there is no proof in the record, as the Court of Appeals accurately observed, suggesting that the alleged requirements of advertising, bar spending or

warehouse locations, or the alleged restriction on the sale price of Kestenbaum's distributorship, standing alone, unreasonably restrained trade or commerce or adversely affected competition in the marketplace. The distortion in the theory advanced by Kestenbaum also creates a serious question of the proof of causation of damage from an alleged antitrust violation. The opinion of this Court in *Brunswick Corporation* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) stands for the proposition that any private recovery of damages must be directly caused by conduct that is anticompetitive under the antitrust laws. Under Kestenbaum's distorted theory advanced by his Petition for Writ of Certiorari, the anticompetitive aspects of the distributorship arrangement with Falstaff are the alleged price fixing and territorial and customer allocation aspects of the arrangement. Yet, Kestenbaum's damages are based on increased expenses from bar spending, advertising and warehouse location, and his receipt of a lesser amount for the goodwill of his business than he felt he should have received. There is simply no causal connection between the alleged anticompetitive conduct (price fixing and elimination of intrabrand competition through territorial restrictions) and the damages that Kestenbaum attempts to uphold. Plainly, under the decisions of this Court, Kestenbaum attempts to stretch his claim for damages beyond those attributable to any supposed antitrust injury.

The final point raised by Kestenbaum's Petition for Writ of Certiorari concerns the Court of Appeals' holding that Kestenbaum's proof of the goodwill value of his business did not properly comport with the method established as the law of the case in the initial decision of the Court of Appeals. Although Kestenbaum makes a token effort in his Petition for Writ of Certiorari to show that such a standard was followed, he ultimately reverts to the argument that

the standard adopted by the initial Court of Appeals' decision — referred to by Kestenbaum as the "accounting definition" — is confusing and difficult to apply, and that the "market value test" is sufficient and should be upheld. (Petition for Writ of Certiorari at 31.) Again, this point raises a matter of the sufficiency of proof that was appropriately disposed of by the Court of Appeals.

The Court of Appeals noted that it had established the specific elements which an estimate of goodwill must take into account in its prior opinion, and observed that the trial court properly instructed the jury on this issue. 575 F.2d at 574. As the Court of Appeals noted, its prior definition of the method of proving goodwill has been widely approved, and is certainly the law of the case. *Id.* Kestenbaum simply failed to adduce proof according to the formula set forth in the initial opinion of the Court of Appeals. As a matter of the sufficiency of proof offered at the retrial of the case, the Court of Appeals' opinion properly concluded that Kestenbaum's proof of goodwill was insufficient.

CONCLUSION

It is apparent that the rulings of the Court of Appeals for the Fifth Circuit attacked by Kestenbaum's Petition for Writ of Certiorari speak to evidentiary matters and are founded upon insufficiencies in the proof adduced by Kestenbaum at the trial of the case. Kestenbaum's Petition for Writ of Certiorari requests this Court to reconsider the evidence adduced at trial and to find contrary to the rulings of the Court of Appeals. The task is obviously not one that should be undertaken by this Court. The holdings of the Court of Appeals are in accord with the applicable prevailing law and compelled by the factual record developed at the trial of the case. Petitioner has not demonstrated, as he cannot, any meritorious reason why his Petition for

Writ of Certiorari should be granted. Accordingly, Falstaff submits that Kestenbaum's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33 of this Court, three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served upon counsel for Petitioner by placing the same in the United States mail, first class postage prepaid, and properly addressed to counsel of record for Petitioner, on this 24th day of January, 1979.

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